FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W.P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF ON THE MERITS

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November 23, 1976

Dunbar Printing Co., Dunbar, W. Va.

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SUMMARY OF REPLY ARGUMENT

This summary is incorporated into this brief for the purpose of explaining the logical arrangement of the appellant's reply. The appellant will first of all address the two basic points most recently discussed in the appellant's Brief On The Merits. These two are the main Notice-Hearing-Due

Process issue and secondly the due process effect of permitting a statute of limitations (however created) to be utilized to pre-empt the constitutional right to notice and hearing before something is done to one's person or property rights. The third segment of this reply brief is inserted strictly for the purpose of clarification.

- I -

The West Virginia Supreme Court of Appeals through Chief Justice Haden, in the fourth part of its opinion was proceeding in the direction of an acceptance of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 336 (1950), and had the Court not deviated from this direction the main due process issue by the Court would probably have resulted in ultimate relief for the appellant. The Court did not, however, establish this approval, but became involved with a problem created by the Court itself with the term "Interested Parties" (pp. 16A, *et seq.*, Jurisdictional Statement). It should also be made clear that the case of *State v. Simmons*, 135 W. Va. 196, 64 S. E. 2d 503 (1951), was a three to one decision in the year 1951 (one judge not participating), which by no means left the law in the State of West Virginia settled for the period of time from 1951 to the present. The fact that *State v. Simmons, supra,* was a three to one decision further reinforces the assertion that the law was not settled, as the appellee, Columbia Gas Transmission Corporation, would have the Court believe by its repeated references to *King v. Mullins*, 171 U. S. 404 (1898).

Further, the case of *King v. Mullins, supra,* interpreted the forfeiture for non-entry law of the State of West Virginia, not the delinquency for non-payment of taxes law. All that case really holds is that forfeiture for non-entry can take place by operation of law and does not have to be judicially determined. This does not violate due process because when a suit is brought to sell the land thus forfeited, all claimants are to be made parties and to be brought in by personal service of summons upon all found in the county. The Court says, at page 429:

". . . . it would seem to follow necessarily that if the statutes of the State, in connection with the constitution, gave the taxpayer reasonable opportunity to protect his lands against a forfeiture arising from his failure to place them upon the land books, there is no ground for him to complain that his property has been taken without due process of law."

As an historical fact, this case now before this Court is the first time the main due process issued involved with delinquent tax sales in the State of West Virginia has been fully and thoroughly litigated to this level, notwithstanding the contrary claims of appellee, Columbia.

As an historical oddity it is significant that nowhere in his admittedly learned dissertation, does the Chief Judge of the West Virginia Supreme Court of Appeals note the extremely well reasoned article on this subject by The Honorable George G. Bailey, entitled, "Process in Forfeited and Delinquent Lands Suits - A Moot Question," 54 W. Va. L. Rev. 47 (1951).

The undersigned would highly recommend to the Court that it review this law review article as well as a review of the excellent dissent in *State v. Simmons, supra,* by Judge Fox, for further information on this topic.

Appellant would also call attention to the recent case of *Dow v. State of Michigan,* 396 Mich. 192, 240 N. W. 2d 450 (1976), decided April 1, 1976. This case, involving the Delinquent Tax Law of the State of Michigan, considers in detail every question raised by the instant case and decides all in favor of the property owner who does not receive adequate notice. It is submitted that this case and the article from The Yale Law Journal mentioned in Appellant's Brief On The Merits are sufficiently persuasive. Indeed, as stated in the *Dow* case "the burden (due process) required by the Constitution is manageable."

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What we are dealing with in the second phase of this action (Due Process - The Statute of Limitations or Statutory Entitlement Question), is really confiscation of property by administrative action and not judicial action. Unfortunately, however, it is a situation where the administrative action is being allowed to masquerade as a judicial action. The brief of Amicus Curiae filed on behalf of the State of West Virginia serves to point this out with citation of the West Virginia case of *Sims v. Fisher,* 125 W. Va. 512, 25 S. E. 2d 216 (1943). (See page 16 Amicus Curiae Brief). By its reference to *Sims v. Fisher, supra,* the Attorney General's brief points out that that case held that a legislative mandate requiring Circuit Courts to perform administrative and nonjudicial functions is unconstitutional. The brief goes on to say that in order to comply with *Sims v. Fisher* the Legislature, therefore, decreed that a suit be brought, as was done in the instant case. Unfortunately, however, the result was a suit that is not a suit and, therefore, by following the Attorney General's argument we are led to the conclusion that the present law is unconstitutional for the reason that it is not a judicial proceeding even though it is said to be judicial in nature.

By toiling with form over substance, the appellee and the Attorney General have ignored the basic fact that a lawsuit needs a defendant who has some rights at the time the lawsuit is instituted and, hopefully, a defendant who retains certain of these rights during the pendency of the proceeding. Otherwise there is no point in having a defendant, regardless of what technical justification is employed in calling the defendant a defendant when in reality he or she is not. A reaffirmation is needed of some of the "hard logic" called for by Judge Fox in *Sims v. Fisher, supra,* as well as the comments of Justice Seldon referred to in the Jurisdictional Statement at page 10 of that document, which states:

"It follows that a law which, by its own inherent force, extinguishes rights of property or compels their extinction without any legal proceedings whatever, comes directly in conflict with the constitution."

This Court is being asked by appellee, Columbia, and the Amicus Curiae, one of the State of West Virginia's constitutional officers, to condone, if not affirm, a statute which flies in the face of the due process of law and the natural law on which the common law is based. If in fact a statute of limitations is to be allowed to curtail the rights of the appellant in this setting it should only be allowed to do so after a reasonable time has run after the institution and final adjudication of the action, not before. Here the appellee, Columbia, and the Attorney General of the State of West Virginia are attempting to deprive a citizen of her rights in violation of the Fourteenth Amendment, as well as the natural law, by a legislative fiat which pre-empts these rights before they even accrue. Accrue they must for the action complained of (the Deputy Commissioner's) to be a legitimate action.

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The appellee, Columbia, has endeavored to accomplish a victory of form over substance. By stating "the record is devoid of any indication that the Deputy Commissioner of Forfeited and Delinquent Lands for Kanawha County, West Virginia, knew or should have known the name or address of Pearson," it is inherently clear that the appellee, Columbia, chooses to ignore the frequently referred to stipulation "D" (A.52), which stipulation can only lead to the inference that this knowledge was available. The appellant is not suggesting that the Deputy Commissioner should be required by some mandate to conduct such a title examination as suggested, at p. 12 of appellee's, Columbia's, Brief On The Merits. However, this matter of notice could be managed by two simple courses of action. One, in cases where personal service can be obtained, the

record will clearly show personal service, thus eliminating any problems associated with process. Two, in cases where personal service cannot be obtained it will be a relatively simple matter, considering the property rights involved, for a short evidentiary hearing to be held concerning the efforts to ascertain the whereabouts and the efforts to personally serve such named defendants on whom service cannot be personally obtained. In the case of those who are published against as unknowns, a short evidentiary statement could be obtained which would explain the reason for proceeding against such persons as unknowns. As a part of the record on file this statement would then be available for determining the validity of the derivative title obtained at the tax sale. In this day of concern for the constitutional protection of the rights of accused in criminal matters, it is not too much to assume some minimal assertion by the courts in this civil law area to protect the rights of persons in their property, At least in criminal trials the accused must be present in court before his alleged wrongdoings may be adjudicated.

With regard to the requirements of pleading a statute of limitations the jurisdictional statement, the supplemental brief thereon, and the Brief On The Merits by the appellant have clearly pointed out the many problems the appellee has with this particular situation. The explanation offered by the appellee, Columbia, is not adequate. The fact is the Supreme Court of the State of West Virginia rescued appellee, Columbia, from what would have otherwise been an untenable position and it is doing its best to rationalize an argument it did not initiate in the first place.

The specific requirements for a statute of limitations are enunciated in 51 American Jurisprudence 2d pp. 596 and 640:

"Historically, the laws limiting actions are the creation of statute. Thus, limitation-of-action concepts have come into the law not through the judicial process but through legislation, and where there is no statute of limitations applicable to the case there can be no default rising from

mere lapse of time. One may have the protection of the policy of the statute of limitations while it exists, but the history of limitation pleas shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

"Generally speaking, the nature of the cause of action determines the applicable statute of limitations, and of course, a statute of limitations can never become operative until there is a cause of action to which it may be applied.

"A limitation statute applies generally to all causes of action within its terms, and any action brought after the time limited for its commencement prima facie is barred regardless of the hardship which it may work. However, such a statute applies only to the particular actions which it recites, and no others, and the courts cannot, under the guise of construction, apply a statute of limitations to cases not within the statutory provisions."

It is apparent from a reading of W. Va. Code, 11A-3-8 that the above requirements for a statute of limitations are not met.

CONCLUSION

It is abundantly clear that the main point involved in this case is that of whether notice and hearing protections are to be afforded property owners as they have been afforded in many other areas of the recently developing common law. The second concern is a matter of natural law and in doing that which is right. Is our judicial process to be subverted in such a manner that we are to allow form - no matter how artfully contrived - to overpower substance - to terminate the rights of an individual without due process of law?

The appellant is not seeking to have this Court define whose motives are the most pristine - those of the purchasers at a tax sale or those of a "former owner" who subsequently seeks redemption of her interest - the appellant is seeking justice not only for herself, but for those who may follow

her. Due to the many obvious layers of procedure and the many burdens placed upon the appellant from a brief perusal of this record, it is apparent, few, if any, could afford to litigate the questions involved in this proceeding unless the potential rewards were remunerative. The peculiar element which this litigation contains is the preciseness of the issues involved and their general applicability to many other litigious proceedings involving tax sales. With this case the Court has the opportunity to decide the validity of procedures to be followed in many jurisdictions for many years in the future. If modifications are in order, as is strongly urged by appellant, now is the time to see that the appropriate steps are taken.

Based on the foregoing the appellant restates her previous position that her Fourteenth Amendment Rights have been violated necessitating a reversal of the Court below by this Honorable Court.

Respectfully submitted,

s/Philip G. Terrie
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Charleston, West Virginia 25301
Counsel for Appellant

AFFIDAVIT OF SERVICE OF APPELLANT'S REPLY BRIEF ON THE MERITS

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, PHILIP G. TERRIE, attorney for Cecle G. Pearson, Appellant herein, depose and say that on the 23rd day of November, 1976, I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and, further, that I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon Columbia Gas Transmission Corporation, Appellee herein, by depositing the same in a United States Post Office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the Appellant's Reply Brief On The Merits to the Supreme Court of The United States upon The State of West Virginia by depositing the same in a United States Post Office or mail box with first class postage

prepaid, addressed to Jack C. McClung, counsel of record for said The State of West Virginia, at his office, Room 26-E, State Capitol, Charleston, West Virginia 25305.

/s/ Philip G. Terrie

Subscribed and sworn to before me by Philip G. Terrie, at Charleston, West Virginia, this 23rd day of November, 1976.

My commissior expires September 24, 1978.

/s/ Mary C. Matheny
Notary Public in and for
Kanawha County, West
Virginia